IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

No. , Original.

EX PARTE IN THE MATTER OF SOUTHWESTERN SURETY INSURANCE COMPANY,
Petitioner.

Motion for Leave to File Petition for Prohibition.

Comes here now the Southwestern Surety Insurance Company, a corporation, and moves the court for leave to file a petition for a writ of prohibition directed to the Honorable James E. Boyd, Judge of the United States District Court for the Western District of North Carolina, which petition is annexed hereto.

HAYDEN JOHNSON,
Attorney for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. , Original.

EX PARTE IN THE MATTER OF SOUTHWESTERN SURETY INSURANCE COMPANY,
Petitioner.

Petition for Prohibition.

The petition of the Southwestern Surety Insurance Company respectfully shows as follows:

1. Your petitioner is a corporation organized under the laws of the State of Oklahoma, having its principal offices in Denison, Oklahoma, and Denison, Texas, and during the year 1914 was engaged in the corporate surety business, having an office and agent in the District of Columbia, among other places.

2. July 9, 1914, the W. J. Brent Construction Company, of Norfolk, Virginia, a copartnership, made a

contract with the United States for the construction of a post office building in Gastonia, North Carolina; and July 28, 1914, the said contractors gave a bond to the United States in the penalty of $27,000, conditioned for the performance of the said contract, with the additional obligation that the said contractors should promptly make payments to all persons supplying them with labor and materials in the prosecution of the work provided for in said contract, which bond was underwritten by your petitioner as the sole surety.

3. Pending the performance of said contract, the said contractors fell into bankruptcy in the District Court of the United States for the Eastern District of Virginia, and the said contract was thereupon completed, to-wit, April 15, 1916, by the Trustee under the authority of the said court, and on final settlement of said contract, authorized May 13, 1916, a balance of $15,029.10 was found due from the United States, which balance was subsequently impounded by the Supreme Court of the District of Columbia, in Equity Cause No. 35019, for the exoneration of your petitioner as the surety in the said bond, and for the benefit of all unpaid persons who had supplied the said contractors with labor and materials in the prosecution of said work, the said Trustee in Bankruptcy having been first duly authorized to abandon and surrender his claim to the said balance. May 2, 1917, nine of such persons jointly filed an intervening petition in the said equity suit, namely, B. F. Kline, Dominion Metal Products Corporation, Carolina Portland Cement Company, Southern Gypsum Company, R. F. Taylor Company, Guion & Company, F. E. Smith Granite Company, Miller Safe Company, and P. R. Huffstetler, which petition is still pending, and which alleges the

pendency of an action on the said bond, and their proceedings in connection therewith, as hereinafter set forth.

4. January 13, 1917, an action on the said bond was brought in the District Court of the United States for the Western District of North Carolina, in the name of the United States of America, to the use and benefit of B. F. Kline, trading under the firm name of Gas Fixture and Brass Company, against the said W. J. Brent Construction Company, a partnership composed of William J. Brent, George H. Brent, and Alice W. Brent, of Norfolk, Virginia, W. R. L. Taylor, Trustee in Bankruptcy for the Brent Construction Company, and William J. Brent, George H. Brent, and Alice W. Brent, individually, and the Southwestern Surety Insurance Company, your petitioner, seeking the recovery of a judgment *in personam* against your petitioner and the other defendants, for the sum of $690.00, with interest, for certain material supplied the said copartnership by the said B. F. Kline in the prosecution of the said work; the said action being No. 995 in the said court.

5. January 13, 1917, a summons was issued to the Marshal of the Western District of North Carolina, commanding him to summon "Southwestern Surety Insurance Company, (Thomas Griffith, Agent, Charlotte, N. C.), citizen and resident of the Western District of North Carolina," to appear in said court the first Monday in June, 1917, "then and there to answer the complaint of United States of America to the use and benefit of B. F. Kline trading under the firm name of Gas Fixture & Brass Company," and directing the said defendant to take notice that if it failed to answer

the said complaint within the time limited by law, the plaintiff would apply to the court "for the relief demanded in the complaint of United States of America to the use and benefit of B. F. Kline trading under the firm name of Gas Fixture & Brass Company," and the same date a similar summons was issued to the Marshal of the Eastern District of Virginia likewise commanding him to summon the other defendants. The Marshal returned the first summons as executed January 17, 1917, "by reading the within summons to Thomas Griffith, agent for the Southwestern Insurance Co., and delivering to him a true copy of same;" and the Marshal returned the second summons as executed February 1, 1917, by delivering a true copy to W. J. Brent and Alice W. Brent, in person, in Norfolk, Virginia, and further executed February 2, 1917, by delivering a true copy to George H. Brent, in person, in Norfolk, Virginia, and that due and legal service thereof was accepted by the defendant W. R. L. Taylor, Trustee, in Norfolk, Virginia, January 16, 1917. No other summons or process has ever been issued in the said action, nor has any notice of any kind of any other claim therein ever been given to your petitioner or the defendants Brents.

6. When your petitioner came to defend the said action, it appeared specially and moved the court to quash the said summons and service, for that the said Thomas Griffith was not, and since November 1, 1916, had not been, the process or other agent of your petitioner, and for that the authority granted to your petitioner under the provisions of the Act of Congress of August 13, 1894, as amended by the Act of Congress of March 23, 1910, was revoked by the Treasury Department November 1, 1916, and for that February 29, 1916,

the Southern Surety Company, under the terms of an indemnity agreement approved by the Treasury Department, reinsured all of the bonds executed by your petitioner Southwestern Surety Insurance Company, wherein the Government had any interest of a direct or indirect nature; and for that the said court was therefore without jurisdiction in the premises. Thereafter, namely, October 30, 1917, the assignee of the claim of the use-plaintiff B. F. Kline entered the said cause dismissed as to the said claim, with the approval of the said court.

7. When your petitioner came to defend the said action, it found in the files therein certain intervening petitions filed January 13, 1917, by the Southern Gypsum Company, J. E. Smith Granite Company, R. F. Taylor Company, A. H. Guion & Company, Carolina Portland Cement Company, and L. H. Miller Safe & Iron Company; an intervening petition filed January 25, 1917, by the Dominion Metal Products Corporation; and also an intervening petition filed by P. R. Huffstetler May 3, 1917,—more than one year after the completion of the work under said contract; to each of which petitions your petitioner specially appeared, and moved the court to strike the same from the files, for the reasons that (1) the said petitions were unsigned and unsworn by the said intervenors, (2) no order had been asked or passed authorizing the said petitions to be filed in the said action, (3) no process had been issued on the said petitions, nor had any notice of their filing been given to your petitioner, (4) the said petitioners had not been made parties to the said action, and (5) the said court was without jurisdiction in the premises.

8. Your petitioner also found in the said files an intervening petition of Frank B. Ingold filed January 27, 1917; of Stewart & Romaine Manufacturing Company filed April 3, 1917; of Binswanger & Company, filed April 3, 1917; and of General Fire Extinguisher Company, filed April 27, 1917,—more than one year after the completion of the work under said contract; to each of which petitions your petitioner specially appeared, and moved the court to strike the same from the files, for the reasons that (1) no order had been asked or passed authorizing the said petitions to be filed in the said action, (2) no process had been issued on the said petitions, nor had any notice of their filing been given to your petitioner, (3) the said petitioners had not been made parties to the said action, and (4) the said court was without jurisdiction in the premises.

9. Your petitioner also found in the said files an intervening petition of The McClamroch Company, filed February 7, 1917; of the Norfolk Iron & Wire Works, filed March 10, 1917; and of the Piepkorn-Henning Electric Company, filed May 7, 1917,—more than one year after the completion of the work under said contract; to each of which petitions your petitioner specially appeared, and moved the court to strike the same from the files, for the reasons that (1) no process had been issued on the said petitions, nor had any notice of their filing been given to your petitioner, (2) the said petitioners had not been made parties to the said action, and (3) the said court was without jurisdiction in the premises.

10. All of your petitioner's aforesaid motions were duly filed, to-wit, June 13, 1917, and were overruled October 30, 1917; to which ruling the court allowed

your petitioner an exception, and the court also gave your petitioner until the December Term of the said court within which to demur, plead, or answer to the original complaint and intervening petitions therein.

11. Each of the intervening petitions, filed in the said action, sets forth a separate and distinct claim, which is antagonistic not only to the use-plaintiff and the defendants in the said action but also to all other claims; and each intervenor seeks the recovery of a judgment *in personam* against your petitioner, without any process or notice whatever to your petitioner on any claim, except only that of the use-plaintiff; whereas due process of law requires such process or notice.

12. By reasons of the matters and things in this petition and in the said motions set forth, the said Judge is proceeding in the said action without power, and the said court is proceeding without jurisdiction.

The premises considered, your petitioner respectfully prays that a rule may be issued to the Honorable James E. Boyd, Judge of the District Court of the United States for the Western District of North Carolina, to show cause why a writ of prohibition shall not be issued to prevent any further proceedings in the said action, and that on his return to such rule, a writ of prohibition may go as prayed.

SOUTHWESTERN SURETY INSURANCE COMPANY,

By THOMAS M. FIELDS,
Attorney.

DISTRICT OF COLUMBIA, *ss:*

Thomas M. Fields, being first duly sworn, deposes and says that he is the local attorney of the petitioner Southwestern Surety Insurance Company, named in

the foregoing petition; that the matters and things therein set forth are true; that in his opinion the grounds of the said petition are well-founded; that the said petition is in good faith, and is not for the purpose of delay.

THOMAS M. FIELDS.

Subscribed and sworn before me this 20th day of November, 1917.

KATHERINE A. BAKER,
Notary Public, D. C.

[NOTARIAL SEAL]

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. , Original.

EX PARTE IN THE MATTER OF SOUTHWESTERN SURETY INSURANCE COMPANY,
Petitioner.

Memorandum Brief.

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1. Process or notice to the defendant surety on the intervening petitions is essential to jurisdiction to render valid judgments *in personam*, and the process to answer the claim of the use-plaintiff affords no power to render such judgments. *In the Matter of the Indiana Transportation Company, Petitioner*, 244 U. S. 456, 457-458; *Gilbert* v. *Washington Beneficial Endowment Association*, 10 App. D. C. 316, 323, 324, 333-334. If process or notice on the new claims of the new claimants be not required, the result is really amazing. For example, in an action brought on a bond in the Supreme Court of the District of Columbia, the process is

returnable on or before the twentieth day after service, and without any—or a sufficient—affidavit of defense, a judgment on motion passes against the surety. Such action may be brought, and judgment recovered, in favor of the use-plaintiff, during the seventh month after final settlement, thus leaving five months more for other creditors to file their claims and be made parties to the action. In order that such other creditors may recover judgments *in personam* against the surety, it would only be necessary for them to file their claims, either with or without an order of court, and enter judgments at their pleasure, without the slightest notice or opportunity to the surety to be heard. The return time of process differs in probably every District. In a recent action on a similar bond in the Delaware District, process issued August 9, 1917, to the surety, to answer the claim of the use-plaintiff, returnable September 11, 1917. The Marshal executed the process by substituted service,—that is, by leaving a copy at the house of the alleged process agent of the surety. Neither the process nor any other notice ever reached the surety, but somewhat accidently the pendency of the action was discovered in the latter part of October, 1917, whereupon the surety attempted to enter a special appearance to contest the jurisdiction of the court over the claim of the use-plaintiff and the claims of numerous intervenors, but was confronted by the refusal of the Clerk to file its motions, on the ground that the time had "long since expired," and on the further ground that a special appearance could not be entered except "after application to the court and leave obtained." In that instance, also, not the slightest attempt was made to give the surety any notice whatever of the interventions, although the sole

object of the action and interventions was to recover judgments *in personam* against the surety. Thus it is that instead of the court being astute to see that the defendant is given notice and opportunity to be heard, the actual procedure is the reverse. Informal or accidental notice to the defendant, of an action filed, is not the equivalent of the formal process or notice required by due process. One may be informally told on the street that he has been sued, but that does not give the court jurisdiction to enter a judgment *in personam* against him. A defendant is not required at his peril to exercise incessant vigilance to see that he has been sued. If process or notice on intervention is not necessary, the surety must keep a man continuously on guard for six whole months, to protect itself against judgments by default on claims of which it would otherwise know nothing.

2. Service of process or voluntary appearance is absolutely essential to the validity of a personal judgment. *McDonald* v. *Mabee*, 243 U. S. 90; *Pennoyer* v. *Neff*, 95 U. S. 629; *Karrick* v. *Wetmore*, 205 U. S. 141, 160, affirming 25 App. D. C. 415.

3. The Act of February 24, 1905, provides that in an action on the bond, instituted by a creditor, "any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under the contract, and not later." The statute requires the creditor not only to file his claim in such action but also to be made a party thereto. Both things are essential. An order of court is necessary to make him a party to the action, even if it be unnecessary to allow him to file his claim. An intervenor is not at liberty to make himself a party to a judicial proceeding, regardless of the court and the

original parties. Filing a claim without being made a party to the action is no more efficacious than being made a party without filing a claim. Some action by the court, and some notice to the defendant, are essential to intervention for the purpose of recovering a judgment *in personam* against the defendant. There is no arrest of the defendant, nor any *res* in the control of the court.

4. The statute requires intervention within one year from the completion of the work under the contract, and not later. As the work was completed April 15, 1916, the petitions filed after that date are out of time, and beyond the power of the court. *United States* v. *McCord*, 233 U. S. 157, 162.

5. The claims are several, and represent distinct causes of action in different parties, although consolidated in a single suit. *Illinois Surety Company* v. *United States*, 240 U. S. 214, 225.

6. The Treasury Department's revocation of the authority of the Southwestern Surety Insurance Company, automatically revoked the appointment and power of its process agent. Act of Congress of August 13, 1894, 28 St. L. 279. The process may run into any other District. *United States* v. *Congress Construction Company*, 222 U. S. 199, 203-204. The process may also be served on the clerk of the court if the process agent be removed, resign, die, become insane, or otherwise incapable of acting. Section 2, Act of August 14, 1894.

Respectfully submitted,

HAYDEN JOHNSON,
Attorney for Petitioner.

Washington, D. C.,
November 20, 1917.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 28, Original.

EX PARTE IN THE MATTER OF SOUTHWESTERN SURETY INSURANCE COMPANY,
Petitioner.

BRIEF FOR PETITIONER.

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No. 28, Original.

EX PARTE IN THE MATTER OF SOUTHWESTERN SURETY INSURANCE COMPANY,
Petitioner.

Brief in Support of Petition for Prohibition.

I.

STATEMENT OF CASE.

The petitioner is a corporation organized under the laws of the State of Oklahoma, having its principal offices in Denison, Oklahoma, and Denison, Texas, and during the year 1914 was engaged in the corporate surety business, having an office and agent in the District of Columbia, among other places. July 9, 1914, the W. J. Brent Construction Company, Norfolk, Virginia, a copartnership, made a contract with the United States for the construction of a post office building in Gastonia, North Carolina; and July 28, 1914, the con-

tractors gave a bond to the United States in the penalty of $27,000, conditioned for the performance of the contract, with the additional obligation that the contractors should promptly make payments to all persons supplying them with labor and materials in the prosecution of the work provided for in the contract, which bond was underwritten by the petitioner as the sole surety. Pending the performance of the contract, the contractors fell into bankruptcy in the District Court of the United States for the Eastern District of Virginia, and the contract was thereupon completed, April 15, 1916, by the trustee under the authority of the court, and on final settlement of the contract, authorized May 13, 1916, a balance of $15,029.10 was found due from the United States, which balance was subsequently impounded by the Supreme Court of the District of Columbia, in Equity Cause No. 35019, for the exoneration of the petitioner as the surety in the bond, and for the benefit of all unpaid persons who had supplied the contractors with labor and materials in the prosecution of the work, the trustee in bankruptcy having been first duly authorized to abandon and surrender his claim to the balance. May 2, 1917, nine of such persons jointly filed an intervening petition in the equity suit, namely, B. F. Kline, Dominion Metal Products Corporation, Carolina Portland Cement Company, Southern Gypsum Company, R. F. Taylor Company, Guion & Company, F. E. Smith Granite Company, Miller Safe Company, and P. R. Huffstetler, which petition is still pending, and which alleges the pendency of an action on the bond, and their proceedings in connection therewith, as hereinafter set forth. January 13, 1917, an action on the bond was brought in the District Court of the United States for the Western Dis-

trict of North Carolina, in the name of the United States of America, to the use and benefit of B. F. Kline, trading under the firm name of Gas Fixture and Brass Company, against the W. J. Brent Construction Company, a partnership composed of William J. Brent, George H. Brent, and Alice W. Brent, of Norfolk, Virginia, W. R. L. Taylor, Trustee in Bankruptcy for the Brent Construction Company, and William J. Brent, George H. Brent, and Alice W. Brent, individually, and the Southwestern Surety Insurance Company, your petitioner, seeking the recovery of a judgment *in personam* against your petitioner and the other defendants, for the sum of $690.00, with interest, for certain material supplied the copartnership by B. F. Kline in the prosecution of the work; the action being No. 995. January 13, 1917, a summons was issued to the Marshal of the Western District of North Carolina, commanding him to summon "Southwestern Surety Insurance Company (Thomas Griffith, Agent, Charlotte, N. C.), citizen and resident of the Western District of North Carolina," to appear in court the first Monday in June, 1917, "then and there to answer the complaint of United States of America to the use and benefit of B. F. Kline trading under the firm name of Gas Fixture & Brass Company," and directing the defendant to take notice that if it failed to answer the complaint within the time limited by law, the plaintiff would apply to the court "for the relief demanded in the complaint of United States of America to the use and benefit of B. F. Kline trading under the firm name of Gas Fixture & Brass Company," and the same date a similar summons was issued to the Marshal of the Eastern District of Virginia likewise commanding him to summon the other defendants. The Marshal re-

turned the first summons as executed January 17, 1917, "by reading the within summons to Thomas Griffith, agent for the Southwestern Insurance Co., and delivering to him a true copy of same;" and the Marshal returned the second summons as executed February 1, 1917, by delivering a true copy to W. J. Brent and Alice W. Brent, in person, in Norfolk, Virginia, and further executed February 2, 1917, by delivering a true copy to George H. Brent, in person, in Norfolk, Virginia, and that due and legal service thereof was accepted by the defendant W. R. L. Taylor, Trustee, in Norfolk, Virginia, January 16, 1917. *No other summons or process has ever been issued in the said action, nor has any notice of any kind of any other claim therein ever been given to the petitioner or the defendants Brents.*

When the petitioner came to defend the action, it appeared specially and moved the court to quash the summons and service, for that Thomas Griffith was not, and since November 1, 1916, had not been, the process or other agent of the petitioner, and for that the authority granted to the petitioner under the provisions of the Act of Congress of August 13, 1894, as amended by the Act of Congress of March 23, 1910, was revoked by the Treasury Department November 1, 1916, and for that February 29, 1916, the Southern Surety Company, under the terms of an indemnity agreement approved by the Treasury Department, reinsured all of the bonds executed by the petitioner Southwestern Surety Insurance Company, wherein the Government had any interest of a direct or indirect nature; and for that the court was therefore without jurisdiction in the premises. Thereafter, namely, October 30, 1917, the assignee of the claim of the use-

plaintiff B. F. Kline entered the cause dismissed as to his claim, with the approval of the court.

When the petitioner came to defend the action, it found in the files therein certain intervening petitions filed January 13, 1917, by the Southern Gypsum Company, J. E. Smith Granite Company, R. F. Taylor Company, A. H. Guion & Company, Carolina Portland Cement Company, and L. H. Miller Safe & Iron Company; an intervening petition filed January 25, 1917, by the Dominion Metal Products Corporation; and also an intervening petition filed by P. R. Huffstetler May 3, 1917,—more than one year after the completion of the work under the contract; to each of which petitions petitioner specially appeared, and moved the court to strike the same from the files, for the reasons that (1) the petitions were unsigned and unsworn by the intervenors, (2) no order had been asked or passed authorizing the petitions to be filed in the action, (3) no process had been issued on the petitions, nor had any notice of their filing been given to the petitioner, (4) the petitioners had not been made parties to the action, and (5) the court was without jurisdiction in the premises.

The petitioner also found in the files an intervening petition of Frank B. Ingold filed January 27, 1917; of Stewart & Romaine Manufacturing Company filed April 3, 1917; of Binswanger & Company, filed April 3, 1917; and of General Fire Extinguisher Company, filed April 27, 1917,—more than one year after the completion of the work under the contract; to each of which petitions the petitioner specially appeared, and moved the court to strike the same from the files, for the reasons that (1) no order had been asked or passed authorizing the petitions to be filed in the action, (2) no process had been issued on the petitions, nor had any

notice of their filing been given to the petitioner, (3) the petitioners had not been made parties to the action, and (4) the court was without jurisdiction in the premises.

The petitioner also found in the said files an intervening petition of The McClamroch Company, filed February 7, 1917; of the Norfolk Iron & Wire Works, filed March 10, 1917; and of the Piepkorn-Henning Electric Company, filed May 7, 1917,—more than one year after the completion of the work under the contract; to each of which petitions your petitioner specially appeared, and moved the court to strike the same from the files, for the reasons that (1) no process had been issued on the petitions, nor had any notice of their filing been given to your petitioner, (2) the petitioners had not been made parties to the action, and (3) the court was without jurisdiction in the premises.

All of the petitioner's aforesaid motions were duly filed June 13, 1917, and were overruled October 30, 1917; to which ruling the court allowed the petitioner an exception, and the court also gave the petitioner until the December Term of the court within which to demur, plead, or answer to the original complaint and intervening petitions therein.

Each of the intervening petitions, filed in the action, sets forth a separate and distinct claim, which is antagonistic not only to the use-plaintiff and the defendants in the action but also to all other claims; and each intervenor seeks the recovery of a judgment *in personam* against the petitioner, *without any process or notice whatever to the petitioner on any claim, except only that of the use-plaintiff;* whereas due process of law requires such process or notice.

By reason of the matters and things in its petition and motions set forth, the petitioner contends that the Judge is proceeding in the action without power, and that the court is proceeding without jurisdiction.

The petitioner prays that a rule may be issued to the Honorable James E. Boyd, Judge of the District Court of the United States for the Western District of North Carolina, to show cause why a writ of prohibition shall not be issued to prevent any further proceedings in the action, and that on his return to such rule, a writ of prohibition may go as prayed.

The petition was duly verified, and was presented to this court with a motion for leave to file it, which motion was granted, and a rule was ordered, returnable January 7, 1918. The rule went December 14, 1917, and on the return day thereof, the respondent filed a "motion to reject petition for prohibition," and a memorandum brief. Subsequently, the respondent filed his answer, admitting all of the facts alleged in the petition, except, perhaps, the date when the work was completed, its completion being laid as of April 15, 1916, in the third paragraph of the petition, to which the respondent replies, in the ninth paragraph of his answer, that "respondent is not advised as to date of completion of the contract referred to, but is advised that said contract was completed May 5, 1917," —a manifestly self-contradictory statement. The petitioner's allegation, in paragraph five of its petition, that no summons or process has ever been issued in the action, nor has any notice of any kind of any claim therein, other than that of the use-plaintiff, ever been given to the petitioner or the defendants Brents, is expressly admitted in the seventh paragraph of the answer; and the petitioner's allegation, in the eleventh

paragraph of its petition, that each of the intervening petitions, filed in the action, sets forth a separate and distinct claim, is also expressly admitted by the respondent in the twelfth paragraph of his answer, wherein he concedes that "each of the claims filed * * * is a distinct claim on behalf of each claimant." In addition, the respondent admits that the various intervening petitions were filed on the dates alleged in the petition for prohibition. The case therefore resolves itself into a question of law upon an admitted statement of fact.

II.

Points and Authorities.

(1) Concerning the Act of Congress of February 24, 1905, 32 St. L., 811, under which the action was brought, in *United States use of Texas Portland Cement Company* v. *McCord*, 233 U. S., 157, 162, the court said:

> By this statute a right of action upon the bond is created in favor of certain creditors of the contractor. The cause of action did not exist before, and is the creature of the statute. The act does not place a limitation upon a cause of action theretofore existing, but creates a new one upon the terms named in the statute. * * * The statute thus creates a new liability and gives a special remedy for it, and upon well-settled principles the limitations upon such liability become a part of the right conferred, and compliance with them is made essential to the assertion and benefit of the liability itself.

(2) The important point now made is that process or notice on the intervening petitions is required by

due process of law, in order to support a judgment *in personam* against the surety. The claims of the use-plaintiff and intervenors are several, and represent distinct causes of action in different parties, although consolidated in a single suit for convenience. *Illinois Surety Co.* v. *United States,* 240 U. S., 214, 225; *Title Guaranty & Trust Company* v. *Crane Company,* 219 U. S., 24; and see *United States* v. *Perth Amboy Shipbuilding & Engineering Company,* 137 Fed., 689; *United States* v. *United States Fidelity & Guaranty Company,* 78 Vt., 445, and *National Surety Company* v. *United States,* 228 Fed., 577, 143 C. C. A., 99. Except for the statute, the creditors with claims arising from distinct contracts, could not join as intenvenors to enforce their claims. See *Gravenberg* v. *Laws,* 100 Fed., 1, 40 C. C. A., 240. Of course, consolidation of various claims in a single action does not dispense with the necessity for process or notice to the defendant as to each and every claim presented. See *Mutual Life Insurance Company* v. *Hillmon,* 145 U. S., 285, 293; *Toledo, St. Louis & Kansas City Railroad Company* v. *Continental Trust Company,* 95 Fed., 497, 506, 36 C. C. A., 155, 164; *Limiansky* v. *Tessier,* 213 Mass., 182, 188.

Service of process, or voluntary appearance, is absolutely essential to the validity of a personal judgment. *McDonald* v. *Mabee,* 243 U. S., 90; *Pennoyer* v. *Neff,* 95 U. S., 629; *Karriek* v. *Wetmore,* 205 U. S., 141, 160. In the case last cited, it is held that a court cannot, consistently with due process of law, set aside a judgment of dismissal without motion or proceedings to vacate the judgment, and without notice, and proceed to render a personal judgment against the defendant, and that the latter judgment, rendered against the defendant in his absence and without his knowledge,

is void for want of jurisdiction. The case is quite interesting, and very emphatically declares the absolute necessity for notice and opportunity to defend before any valid judgment *in personam* can be rendered by any court. There is no possible distinction in principle between a personal judgment based upon an intervening petition in a pending action and a personal judgment based upon the original complaint in such action, since the requirement of process and opportunity to defend is one of substance and not of form.

Process or notice to the defendant surety on the intervening petitions is essential to jurisdiction to render valid judgments *in personam*, and the process to answer the claim of the use-plaintiff affords no power to render such judgments. *In the Matter of the Indiana Transportation Company, Petitioner*, 244 U. S., 456, 457-458; *Gilbert* v. *Washington Beneficial Endowment Association*, 10 App. D. C., 316, 323, 324, 333-334. If process or notice on the new claims of the new claimants be not required, the result is really amazing. For example, in an action brought on a bond in the Supreme Court of the District of Columbia, the process is returnable on or before the twentieth day after service, and on default, or without any—or a sufficient—affidavit of defense, a judgment on motion passes against the surety. Such action may be brought, and judgment recovered, in favor of the use-plaintiff, during the seventh month after final settlement, thus leaving five months more for other creditors to file their claims and be made parties to the action. In order that such other creditors may recover judgments *in personam* against the surety, it would only be necessary for them to file their claims, either with or without an order of court, and enter judgments at their pleasure, without

the slightest notice or opportunity to the surety to be heard. The return time of process differs in probably every District. The sole object of this action and the interventions is to recover judgments *in personam* against the surety. Thus it is that instead of being astute to see that the defendant is given notice and opportunity to be heard, the actual procedure is the reverse. Informal or accidental notice to the defendant, of an action filed, is not the equivalent of the formal process or notice required by due process. One may be informally told on the street that he has been sued, but that does not give the court jurisdiction to enter a judgment *in personam* against him. A defendant is not required at his peril to exercise incessant vigilance to see that he has been sued. If process or notice on intervention is not necessary, the surety must keep a man continuously on guard for six whole months, to protect itself against judgments by default on claims of which it would otherwise know nothing.

In the *Indiana Transportation Company* case, *supra*, the court held that appearance in answer to a citation issued upon a libel *in personam* does not empower the court to introduce new claims of new claimants into the suit without service on the defendant, and the Supreme Court issued a writ of prohibition. The suit in which the writ of prohibition was sought was originally a libel *in personam* against the petitioner, an Indiana corporation, and others, for causing the death of one Dawson through the capsizing of the steamer Eastland in the Chicago River. A citation was served upon an agent of the petitioner within the District. Subsequently, leave was granted to certain parties to intervene as libellants, but no citation went to the petitioner on the new claims of the new claimants, each of whom

alleged a distinct cause of action for death due to the same accident. The petitioner objected to the jurisdiction of the court to consider the new claims without service of citation, but the objection was overruled and the petitioner was directed to answer. The Supreme Court said that the District Court attempted to exceed its jurisdiction and writ of prohibition should be granted. The unanimous opinion of the Supreme Court was delivered by Mr. Justice Holmes, who said (pages 457-458):

> The foundation of jurisdiction is physical power. If a defendant's body were in custody by arrest, or a vessel were held by proceedings *in rem*, it well might be that new claims would be entertained against the person or against the ship, in addition to those upon which the arrest was made. *The Oregon*, 158 U. S., 186, 210. But appearance in answer to a citation does not bring a defendant under the general physical power of the court. He is not supposed even by fiction to be in prison. Conventional effect is given to a decree after an appearance because when power once has been manifested it is to the advantage of all not to insist upon its being maintained to the end. *Michigan Trust Co.* v. *Ferry*, 228 U. S., 346, 353. That, however, is the limit of the court's authority. Not having any power in fact over the defendant unless it can seize him again, it cannot introduce new claims of new claimants into an existing suit simply because the defendant has appeared in that suit. The new claimants are strangers and must begin their action by service just as if no one had sued the defendant before. *The Oregon*, 158 U. S., 186, 205, 210. We may repeat with more force concerning defendants what was said *alio intuitu* in a New Jersey case cited in *Reyn-*

olds v. *Stockton*, 140 U. S., 254, 268, "Persons by becoming suitors do not place themselves for all purposes under the control of the court."

Gilbert v. *Endowment Association*, 10 App. D. C., 316, decided March 1, 1897, was an appeal from a decree in four consolidated suits in equity to reach the assets of an insolvent life insurance company. Certain persons intervened, one of whom was Carrie H. Golden. The court said (pages 323, 324):

> Two parties intervened by petition * * * the second intervenor, one Carrie H. Golden, * * * who had, on December 19, 1894, obtained a judgment for $3,000, on a similar certificate of endowment.
>
> * * * * * * * * *
>
> The petition of Carrie H. Golden was filed on December 10, 1895, after the testimony had been closed for several months, and the cause, or causes, stood ready for hearing. It is said that there was an order of court, making her a party; but the transcript of record before us does not show it. Nor does it appear that there was any service of process under it upon any one, or that there was any further proceeding of any kind upon the petition in the court below.
>
> * * * * * * * * *
>
> Testimony was taken in the consolidated suits, said to be for the complainants, the defendants, the respondents and intervenors, and also testimony in rebuttal; and the cause or causes ultimately came on for hearing. * * *

The court further said (pages 333-334):

> A motion to dismiss the appeal has been made on behalf of Carrie H. Smith, formerly Carrie H. Golden, an intervenor in cause No. 15,907, on

the ground that she has not been made a party to it, and that no citation has been served on her.

This motion is plainly without merit. According to the record, Carrie H. Smith has no standing in this court for any purpose. Her claim has not been adjudicated. There is no decree for or against her. While the record before us does not show, it seems to be conceded that upon her petition there was an order of the court making her a party to the suit, and presumably as a party complainant. But on her part it is specifically alleged that her interests are not identical with those of the original complainant, or even similar to them, but, on the contrary, are rather antagonistic. And yet, upon such claim, antagonistic both to the complainant and the defendant, no service of process has been had upon any one, no answer has been required or made, no testimony taken in support of it, and no proceedings of any kind have been taken to bring it to a hearing. Her petition was filed almost at the last moment, when the testimony on both sides had all been taken and the cause was ready for hearing; and even if due diligence had been used in its prosecution, it would have been manifestly improper to have arrested for the convenience of the petitioner the litigation between the original parties. Original parties should not, under such circumstances, be deprived of the control of their cause, much less should they be required to take notice of a matter of which notice is required to be given to be given to them, if the petitioner would have any action whatever by them. The mere filing of a petition and an *ex parte* order under it cannot compel parties to take notice of the petitioner on appeal or in any other way.

This motion to dismiss the appeal cannot therefore be entertained.

In *United States* v. *Congress Construction Company,* 222 U. S., 199, the court said that the Act of February 24, 1905, provides that only one action shall be brought and that it shall be so instituted and conducted "in point of notice and otherwise," that all demands of that class may be adjudicated therein and included in a single recovery. The notice to which the court referred manifestly relates to the claims of the intervenors as well as to the claim of the use-plaintiff. The form of notice is not so material as the fact of notice. In the action on the bond, the surety had no opportunity to be heard on the various orders passed by the court, all of which were purely *ex parte.* It has been ruled in *United States* v. *McGee,* 171 Fed., 209, that intervention under the Act of February 24, 1905, is not a matter of unqualified or absolute right, but is subject to the control of the court, and the general principles governing the doctrine of intervention. The books show to a demonstration that many claims presented in an action of this kind are not for either material or labor within the meaning of the statute or bond, and the surety must therefore be certainly entitled to notice and opportunity to defend against every claim which is sought to be made a personal judgment against it. There is no *res* in the custody of the court, nor any arrest of the body of the defendant, but nothing whatever is sought except a purely personal judgment against the surety in the bond, on every one of the separate and distinct claims presented by the record in this case. In *Meek* v. *McCall,* 80 Ky., 371, the court says that a defendant affected by the relief sought by an intervenor, must have an opportunity to answer the petition. Of course, there can be no such opportunity without process or notice on such petition.

In 2 *Bates Fed. Eq. Pro.*, 659-670, the subject of intervention is considered, and the author says that if the intervenor's rights are independent, adverse, or paramount, his intervention "is treated as an original suit and is conducted as ordinary suits." The author further says that intervenors must claim according to regular procedure, accepting the authority of the court, "citing adverse parties to defend," and yielding to whatever decree the court may pronounce. It is further said that intervention must be "upon notice." In *American Pig Iron Company* v. *German*, 126 Ala., 194, 240, speaking to the intervening petitions, the court said: "When filed by leave of court, other parties in interest are entitled to notice and an opportunity to defend." If a sheriff seizes property not belonging to the defendant, thus disregarding the opposition of him who alleges that he is the real owner, the remedy of such owner is summary by intervention in the action, "with notice to the sheriff." *Van Norden* v. *Morton*, 99 U. S., 378. In a suit in equity, if the defendant file a cross-bill against the complainant, process on the cross-bill must be issued and served on the complainant, just as process on the original bill must be issued and served on the defendant. 1 *Bates Fed. Eq. Pro.*, page 434, section 382; 16 Cyc., 211, and cases cited in Note 56; and see *American Graphophone Company* v. *Smith*, 26 App. D. C., 563, 566. Since a cross-bill can be filed only by a party to the suit against a party to the suit, and no others, it is manifest that process on intervening petitions filed by strangers is even more essential to the validity of a personal judgment or decree.

In *Hitchman Coal & Coke Company* v. *Mitchell*, 245 U. S., 229, 234-235, the court said:

The final decree of the District Court included an award of injunction against John Mitchell, W. B. Wilson, and Thomas Hughes, who while named as defendants in the bill were not served with process and entered no appearance except to object to the jurisdiction of the court over them. Under the federal practice, the appearance to object did not bind these parties to submit to the jurisdiction on the overruling of the objection (*Harkness* v. *Hyde*, 98 U. S., 476, 479; *Southern Pacific Co.* v. *Denton*, 146 U. S., 202, 206; *Mexican Central Ry. Co.* v. *Pinkney*, 149 U. S., 194, 209; *Goldey* v. *Morning News*, 156 U. S., 518; *Davis* v. *C., C., C. & St. L. Ry. Co.*, 217 U. S., 157, 174), and since the injunction operates only *in personam*, it was erroneous to include them as defendants. It was erroneous to include personal relief by injunction against certain named parties who, pending suit, were chosen to succeed some of the original defendants as officers of the international, district, and sub-district unions, but who were not served with process and did not appear, they being included upon the ground that they were "before the court by representation through service having been had upon their said predecessors in office."

It was suggested in another court that the statute is silent as to process or notice on intervening petitions. However, the same may be said as to process or notice on the original complaint. In addition, if the statute be so construed as to dispense with notice or process on the original complaint, then it is plainly void as violative of the due process clause; and if the law be so interpreted as to dispense with process or notice on intervening petitions, setting up separate and distinct claims of different parties, then the act is equally violative of the constitutional provision. It is not necessary

that a statute shall expressly require personal service of process or notice, in order to support the validity of a judgment or decree *in personam,* since the requirements of the federal constitution are inherently a part of every statute.

(3) The next point now made is that certain of the intervening petitions were filed out of time,—that is to say, more than one year after the completion of the work. The petition filed by the surety shows that the work was completed April 15, 1916. The law provides that where the action is brought by a creditor, only one action shall be brought, "and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later." The intervening petition of Huffstettler was filed May 3, 1917, or eighteen days after the expiration of the one year period; the intervening petition of the General Fire Extinguisher Company was filed April 27, 1917 or twelve days after the expiration of the one year period; and the intervening petition of the Piepkorn-Henning Electric Company was filed May 7, 1917, or twenty-two days after the expiration of the one year period. It may be unfortunate for the intervenors, but the law is inexorable. As held in the *McCord* case, 233 U. S., 157, heretofore quoted, the time limit inheres in the remedy and controls the jurisdiction of the court. The one year period is a condition of the right to sue, and not a mere limitation relating to the remedy, and is therefore available as a defense, without being specially pleaded. *Baker Contract Company* v. *United States,* 204 Fed., 390, 122 C. C. A., 560; and see *United States* v. *Scheurman,* 218 Fed., 915; *United States* v. *Broomer,* 183 Fed., 726, 106 C. C. A., 164; *United States* v. *American Bonding*

Company, 42 App. D. C., 268, and *United States* v. *Illinois Surety Company*, 238 Fed., 840.

The statute requires the intervening creditor not only to file his claim in the action but also to be made a party thereto within one year from the completion of the work under the contract, and not later. Both things are essential. An order of court is necessary to make him a party to the action, even if it be unnecessary to allow him to file his claim. An intervenor is not at liberty to make himself a party to a judicial proceeding, regardless of the court and the original parties. Filing a claim without being made a party to the action is no more efficacious than being made a party without filing a claim.

In *United States use of Bryant Co.* v. *New York Steam Fitting Co.*, 235 U. S., 327, the court said (page 338) that "it is to be remembered that the intervening creditor must file his claim also within a year."

In *United States* v. *Bailey*, 207 Fed., 782, the court says that "performance and final settlement are not synonymous. The first is the agreed work done, the second is the ascertainment or adjustment of rights and liabilities arising thereunder."

(4) That the court can consider the facts exposed by the motions to quash and strike, insofar as such facts do not otherwise appear on the face of the record, is settled beyond controversy in the federal courts. Such, indeed, is the almost universal method of questioning the jurisdiction of a federal court. In the recent case of *Meisukas* v. *Greenough Red Ash Coal Company*, 244 U. S., 54, an action in a federal court against a foreign corporation, it was alleged, as a basis for jurisdiction, that the corporation carried on business in the State of New York and had property therein. The summons

was personally served on the president of the corporation in the District. The corporation appeared specially, and filed its motion to quash the service, on the ground that the corporation transacted no business, and had no property, in New York. An amended complaint was subsequently filed, and on the hearing on the motion, the summons was quashed, and the action was dismissed, and a direct appeal was taken to the Supreme Court on the question of jurisdiction. It was objected that the right to challenge the summons and the jurisdiction resting upon it could not be entertained on a motion to quash, since the local law required the question to be raised by answer or demurrer, to which objection the court unanimously replied as follows (page 58):

> We do not stop to discuss the proposition since it is too clear for discussion that its want of merit is foreclosed by previous decisions of this court which have recognized and upheld the practice of challenging the jurisdiction under circumstances like those here present by way of motion to quash instead of by demurrer.

(5) It will save much time, labor and expense to all parties concerned, including the District Court, if the matters presented by the petition for prohibition be determined at this stage of the litigation, since if they are well founded, the action on the bond must result adversely to the intervenors.

III.

Reply to Respondent's Brief.

(1) It is, of course, no longer open to question that the action on the bond is at law and not in equity, since the decision in *Illinois Surety Co.* v. *United States,* 240 U. S., 214, 223-225. It is even more essential at law than in equity that personal notice be given the defendant of a claim sought to be reduced to a personal judgment.

(2) The respondent contends that the notice by mailing and publication made the intervenors parties, and that "no further order was necessary to make them parties to the suit." The contention is in the teeth of the wording of the statute, which requires an order making the creditor a party as much as it requires him to file his claim. The law is not automatic, but calls for affirmative action by the creditor in the first instance, and by the court in the second. The change from the active to the passive voice is significant.

(3) On page eight of his brief, the respondent quotes an excerpt from the *McCord* case, and then concludes from the language quoted that it is conclusive that no pleading or process on the part of the intervening creditor is necessary. The court was then speaking to a contention wholly different from that presented in this case. Moreover, in *United States* v. *Marshall,* 225 Fed., 687, 760, the identical excerpt quoted from the *McCord* case by the respondent, is apparently referred to the subject of notice to other creditors rather than to the subject of process to the surety, the court holding that intervenors need not give to other creditors the required notice of their right to intervene and be made

parties, but only the creditor in the first-filed or original complaint need give such notice. In addition, the decisions of this court on the necessity for personal notice and opportunity to defend, in order to support a judgment *in personam*, forbid the conclusion that the *McCord* case intended to hold that process on the claim of the use-plaintiff subjects the surety to personal judgments in favor of every other creditor without any other or further notice or opportunity to defend. The *Indiana Transportation Company* case, rather than the *McCord* case, points the duty of the intervenor to give the surety personal notice of his claim, and substantial opportunity to defend against it. The duties of the creditors *inter sese* have nothing to do with their duties to the surety.

(4) While the petition for prohibition alleges, and the respondent concedes, that the claims of the intervening creditors are several, and represent distinct causes of action in different parties, although consolidated in a single suit, citing *Illinois Surety Company* v. *United States*, 240 U. S., 214, 225, as authority for the assertion, the respondent says, on page ten of his brief, that the case cited "so far from holding that the causes of action were distinct, holds the contrary," and he then quotes from the opinion (page 225), beginning immediately after the following language:

> Any creditor who duly presents his claim in such an action becomes a party thereto with a distinct cause of action. *Title Gauranty Co.* v. *Crane, supra.*

On page 223, the court cites the case of *Title Guaranty Company* v. *Crane Company*, 219 U. S., 24, and says:

In *Title Guaranty Co.* v. *Crane Co., supra,* a question arose as to the propriety of allowing a docket fee to each claimant. Section 824 of the Revised Statutes provides for a docket fee of $10 "in cases at law, when judgment is rendered without a jury." The court said: "The allowance of a docket fee of $10 to each claimant appears to us to be correct. Rev. Stat., Section 824. The claims are several and represent distinct causes of action in different parties, although consolidated in a single suit."

IV.

Conclusion.

For the reasons stated, based upon the authorities cited, it is respectfully submitted that the District Judge is proceeding without power in the action on the bond, and that the District Court is proceeding without jurisdiction, and that the writ of prohibition should therefore go to prevent any further proceedings in the action, as prayed in the petition of the surety.

Hayden Johnson,
Attorney for Petitioner.

Thomas M. Fields,
Counsel.

Washington, D. C., March 25, 1918.

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IN THE

Supreme Court of the United States

TERM

No. 28 ORIGINAL

EX PARTE IN THE MATTER OF SOUTHWESTERN SURETY INSURANCE COMPANY, PETITIONER.

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(1) *MOTION TO REJECT PETITION FOR PROHIBITION OF SOUTHWESTERN SURETY INSURANCE COMPANY.*

(2) *MEMORANDUM BRIEF ON BEHALF OF RESPONDENT.*

R. RANDOLPH HICKS,
Attorney for Respondent.

IN THE

Supreme Court of the United States

EX PARTE IN THE MATTER OF SOUTHWESTERN SURETY INSURANCE COMPANY, PETITIONER.

MOTION TO REJECT PETITION FOR PROHIBITION.

Comes here now James E. Boyd, United States District Judge for the Western District of North Carolina, and moves the Court to reject the petition for a writ of prohibition filed herein by the Southwestern Surety Insurance Company against him.

R. RANDOLPH HICKS,
Attorney for Respondent.

IN THE

Supreme Court of the United States

EX PARTE IN THE MATTER OF SOUTHWESTERN SURETY INSURANCE COMPANY, PETITIONER.

The action of B. F. Kline, trading under the name of Gas Fixtures and Brass Company, was brought pursuant to an act of Congress found in 32 Statutes at Large, page 811, Vol. 10, Fed. Statutes Ann'td 343, which provides that any contractor for construction of any public building of the United States shall give bond with good and sufficient surety to promptly pay all persons supplying labor and material in the prosecution of the work provided for in the contract, and giving to such person in the event of failure to make payment, a right of action against the surety on the bond. This statute fixes the limitation and the venue of the action and then provides as follows:

> " That where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract and not later. * * * Provided further, that in all suits instituted under the provisions of this act such personal notice of the

pendancy of such suits informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto, notice of publication in some newspaper of general circulation published in the state or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months befor the time limited therefor."

The act of August 13th, 1894, found in 28 St. L. 279, Vol. 7 Fed. St. Ann'td 201, provides the condition under which surety companies may be accepted on undertakings running in favor of the United States of America. Sec. 2 of that Act provides, in part, as follows:

"That no such company shall do business under the provisions of this act beyond the limits of the state or territory under whose laws it was incorporated and in which its principal office is located, nor beyond the limits of the District of Columbia, when such company was incorporated under its laws or the laws of the U. S., and its principal office is located in said district, until it shall by a written power of attorney appoint some person residing within the jurisdiction of the court for the judicial district wherein such suretyship is to be undertaken, who shall be a citizen of the state, territory, or District of Columbia, wherein such court is held, as its agent, upon whom may be served all lawful process against such company, and who shall be authorized to enter an appearance in its behalf. A copy of such power of attorney duly certified and authenticated, shall be filed with the clerk of the district court of the U. S., for such district at each place where a term of such court is or may be

held, which copy, or a certified copy thereof, shall be legal evidence in all controversies arising under this act. If any such agent shall be removed, resign, or die, become insane, or otherwise incapable of acting, it shall be the duty of such company to appoint another agent in his place as hereinbefore prescribed, and until such appointment shall have been made, or during the absence of any agent of such company from such district, service of process may be upon the clerk of the court wherein such suit is brought with like effect as upon an agent appointed by the company. The officer executing such process upon such clerk shall immediately transmit a copy thereof by mail to the company, and state such facts in his return. A judgment, decree, or order of a court entered or made after such service of process as aforesaid, shall be as valid and binding upon such company as if served with process in said district."

The action in this case was instituted by Kline within the proper time and the process was served by the United States Marshal in the Western District of North Carolina, on Thomas Griffith, who appears of record in the Clerk's Office of the above mentioned court as the statutory agent for the Southwestern Surety Insurance Company, as provided for under the acts of Congress.

On January 13th, 1917, the date of the institution of the suit, the Judge of the District Court entered an order in which, after reciting the names of the creditors of the Brent Construction Company, furnishing labor and materials for the Gastonia post office, and reciting that an action had been brought by Kline, informed the creditors mentioned therein

of their right to intervene and have their claims against the Brent Construction Company adjudicated. The Clerk of the court was ordered to mail a copy to each of the creditors named and it was also ordered that a copy of the order be published as required by the act of Congress, for three successive weeks in a newspaper published in Greensboro. All of these directions were complied with.

The suit instituted by Kline is an action at law, it having been specifically decided by the Supreme Court of the United States that the action contemplated under the statute is at law and not in equity. *Peeler* v. *Surety Com., 240 U. S. 225.*

The court in this case, by the publication and mailing of the order of Jan. 13th, 1917, notified each of these intervenors to come in and prove their claims in this litigation. No further order was necessary to make them parties to the suit. When their petitions of interventions were filed in the Clerk's Office they were filed pursuant to the invitations which had been extended to them by the court.

In the case of *U. S.* v. *McGhee, 171 Fed. 210,* the court held:

> " Before any such creditors shall take judgment on bond for his claim, he is required to bring in, by the prescribed notice, the other creditors who are authorized to intervene in such creditors' suit, so that the court can ascertain and determine the pro rata distribution of the fund among them."

It has been decided by the Federal courts that the statute under which this right of action arises, is remedial and that the act should be interpreted liber-

ally so as to effectuate the intent of Congress. *Cleveland Banker Surety Co.* v. *Maxwell, 222 Fed. 797.* The intent of Congress is manifested by the plain language of the statute, that only one action should be brought and that in that action, after its institution, any creditor could file his claim. In other words, the law and spirit of the law having both been met when the action has been instituted and the defendants having been served with process and invitation extended to the other creditors to come in and file their claims, no further process is necessary on the claims filed by such intervenors. The defendant has already been haled into the United States Court by the original process, to meet his liability under a bond executed pursuant to the statute, which bond is for the benefit of all creditors of the obligee. The filing of claims by other creditors make no new parties defendant to the suit. The claims which they file are claims against the original defendant which the statute permitted them to assert only in the manner prescribed in the statute.

The bond required by the Federal Act performs a double function,—(1) it assures to the United States Government the completion of the contract and (2) it assures payment to all laborers and materialmen. By the express terms of the statute the obligors of the bond promise that the laborers and materialmen shall be paid. The two covenants—the one for the benefit of the Government and for the benefit of all laborers and materialmen, which are as distinct as though they were contained in separate instruments, the Government's name being used as obligee in the latter covenant as a matter of convenience.

U. S. v. *Natnl. Surety Co., 92 Fed. 551.*
U. S. v. *Rundle, 100 Fed. 400.*

The convenience contemplated is that of having the whole controversy determined in one action in the name of the Government. One creditor alone is given the right to start the action and when a summons issues in the name of the United States at the instigation of this one creditor, it is a summons to answer the complete liability of the obligors on the bond. The contention that the defendant must be resummoned on each intervention is a contention which, if sustained, would, in effect, create as many actions as there were interventions, contrary to the express wording of the statute which prohibits more than one action.

The United States by force of the statute makes itself trustee of the interest of the individuals intended to be protected. *American Surety Company* v. *Lawrenceville, 96 Fed. 25.* When suit is instituted by the U. S. Government acting as such trustee, the defendants are summoned to respond for the total amount of their liability to this trustee to be ascertained by the filing of the claims in the manner set out in the statute.

The action is brought by the United States for the benefit of all creditors, and the statute is fully complied with and right to judgment issued when the creditors are notified. *U. S.* v. *Ill. Surety Co., 228 Fed. 306.*

The statute does not contemplate any further pleading after the filing of the original action. The language giving to other creditors their rights is as follows:

> " Where suit is so instituted by a creditor, or creditors, only one action shall be brought, and any creditor may file his claim in such action and be made a party thereto within one year from the completion of the work under said contract, and not later."

The rights of each of these creditors so filing his claims are rights given him in the original action. No intervention by him and no pleading by him can strengthen or affect that original action and he must stand or fall on the pleadings and process of the original suit.

In the case of *U. S.* v. *McCord, 233 U. S. 157*, this court in passing upon a case arising under the statute under review, in which the effort was made to maintain an action on a bond where the original action was instituted before the statute permitted it to be brought, by availing of inventions filed when action could have been brought, said:

> " No service was made or attempted to be had upon it, as required by the statute when original actions are begun by creditors. As we read the certificate, the intervention was what it purported to be, an appearance in the original suit, already brought, and in our view must abide the fate of that suit."

This last mentioned case would seem to be conclusive of the question before the court which holds that the rights of intervenors are fixed by the pleadings and process in the original suit and that the filing of the claim is merely an appearance by the claimant in the original suit.

The logical result of petitioner's contention is, that while the claimant is bound by the pleading and process in the original action, yet he derives no benefit therefrom. The filing of the claims affects the rights of the creditors who institute the suit as well as the rights of the original defendant, because while the obligors of the bond are to pay the amount set out in the bond, this amount is to be prorated amongst all of the claimants.

In the matter of *Indiana Trans. Co., 244 U. S. 456*, the matter in controversy was entirely different from the controversy in the instant case. There a libel was filed *in personam* and other libels were afterwards filed in the same suit for different causes of action. The court held that the defendant should have been summoned on each cause of action. There is but one cause of action on a bond of this kind, only one plaintiff, and that cause of action is, by virtue of the statute, instituted for the total penalty of the bond and the judgment would be for the total penalty of the bond to be discharged upon payment of the sum found due the various claimants. The difference between that case and the instant case is, that in the one the several causes of action are wholly distinct; in the instant case it is entire by virtue of the Act of Congress.

The amazing results pointed out in the brief of petitioner could never obtain. The original suit is for the benefit of all claimants who comply with the statute. Neither the original use-plaintiff nor any other claimant is entitled to judgment for any amount until the total liability on the bond is ascertained in the manner provided by the statute; and, in order that this total liability may be ascertained, the statute

requires publication for three weeks and then gives to the claimants the residue of the year within which to file their claims.

II

The Act of February 24th, 19.., provides for the publication of notice to the various creditors and that each creditor may file his claim. We understand the contention of petitioner to be that though the court invited him to file his claim, and though the statute gives him the absolute right to do so, leaving no discretion to the court, still the court when each creditor does appear must give him a new permission. That the creditors have absolute right to file their claims without permission of the court, has been determined in the cases of *W. U. Tel. Co.* v. *A. G. M. & T. Co., 221 Fed. 505, Minot* v. *McGuire, 95 Fed. 545.*

III

The pleadings filed in this case show the date of the settlement but the date of the completion of the work is not stated. The statement in petitioner's brief that the work was completed April 15, 1916, is a voluntary assumption, on his part, of facts. The work was, in fact, completed May 5th, 1916. The time of completion, however, is thoroughly immaterial on the question of his right to a writ of prohibition. The establishment of that fact goes not to the question of jurisdiction, but to the right to recover.

The case of *Ill. Surety Co.* v. *U. S. 240, U. S. 225,* so far from holding that the causes of action were distinct, holds the contrary. The language used descriptive of an action brought pursuant to the statute, is as follows:

" The obligation of the surety thus enforced in a single action, is a legal obligation to the United States for the use and benefit of the several claimants. We do not regard the requirements that ' the claim and judgment of the United States ' shall have priority, and that the aggregate recovery shall not exceed the penalty of the bond, as inseparable obstacles to proceeding at law. It is the case of an undertaking for the payment of many claims, not to exceed the specified penalty. If the total amount due exceeds the penalty of the bond, it is provided that judgment shall be given to each creditor pro rata of the amount of the recovery'. This, however, merely requires an arithmetical calculation after the different causes of action have been passed upon and the amount due upon each determined. We see no ground upon which the conclusion can be justified that the liability of the surety on its bond is to be determined in equity. The contrary has been the generally accepted and, we think,the correct practice."

IV

The Treasury Department's revocation of the authority of the Southwestern Surety Ins. Co. to do business affected only its capacity to write bonds running to the United States as obligee. It did not affect the powers of attorney which that company had given its process agent. The revocation of a license by the United States cannot operate to revoke powers conferred by the Surety Company. Even if it could have that effect the revocation could not affect rights which had already accrued. The statute requires that an agent be appointed for the service of process in the District where the work is to be performed

before a surety company will be accepted on a bond. When that agent has been appointed and the bond written, it is beyond the power of the surety company to revoke the authority of that agent in so far as liability has already arisen under its bond. Such action is ineffectual.

Cooley v. *Mutual Reserve Fund, 119. Fed. 617.*
Hunter v. *Mutual Reserve Ins. Co. 184 N. Y. 136.*

Respectfully submitted,

R. RANDOLPH HICKS,
Attorney for Respondent.

Office Supreme Court, U.
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JAN 24 1918
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

No. 26, Original.

EX PARTE IN THE MATTER OF SOUTHWESTERN SURETY INSURANCE COMPANY, *Petitioner.*

ANSWER OF RESPONDENT.

By R. RANDOLPH KICKS,
His Attorney.

APPEAL PRESS, RICHMOND, VA.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

No. 28, Original.

EX PARTE IN THE MATTER OF SOUTHWESTERN SURETY INSURANCE COMPANY,
Petitioner.

ANSWER OF RESPONDENT.

And now the said respondent appears before this Hon. Court to which application is made and pleads and says that the writ of Prohibition ought not to be granted,

(1) Because the facts alleged are not sufficient in law to warrant the granting of said writ.

(2) Upon the facts stated the writ of Prohibition is not the proper and appropriate remedy for the wrong complained of,

(3) Respondent admits that petitioner is a corporation organized under the laws of Oklahoma, and is engaged in the business of executing surety bonds. Respondent has no knowledge as to the location of the principal or other offices of petitioner.

(4) Respondent admits that the W. J. Brent Construction Company of Norfolk, Va., entered into a contract with the United States for the construction of a post office building in Gastonia, North Carolina, and executed with petitioner as surety, on July 28, 1914, a bond to the United States in penal sum of $27,000.00 pursuant to the terms of the United States statute of Aug. 13, 1894, 28 statutes at Large 279.

(5) Respondent admits that the W. J. Brent Construction Company fell into bankrupcy but has no knowledge of the proceedings in said bankrupcy nor of any proceedings in the Supreme Court of the District of Columbia in Equity Cause No. 35019, but is advised that the allegations in the petition as to said proceedings in Bankruptcy and Equity Cause is immaterial to the issue set up in the petition.

(6) Respondent admits the allegations set up in paragraph 4 of the petition and alleges that the proceedings in the action therein mentioned were in accordance with the act of Congress found in 32 Statutes at Large page 811.

(7) The allegations of paragraph 5 of the petition are admitted except that respondent says that on the 13th day of January, 1917, it entered an order, pursuant to the statute, directing that personal notice of the pendancy of said suit and informing them of their right to intervene be given to all known creditors and that notice by publication be had in accordance with the United States statute in such case made and provided and that said order was duly complied with and that a number of said creditors filed their claims pursuant to said notice and invitation.

(8) Petitioner appeared specially in said action of the United States who sues, etc., against W. J. Brent Construction Company and petitioner moved to quash the summons and service on petitioner which motion respondent

overruled. At said time the assignee of B. T. Kline acknowledged satisfaction as to the claim set up by said Kline and asked that said cause be dismissed as to him.

(9) On January 13, 1917, the Southern Gypsum Company, J. E. Smith Granite Company, R. F. Taylor Company, A. W. Gueon & Company, Carolina Portland Cement Company, and L. H. Miller Safe and Iron Company, on January 25, 1917, The Dominion Metal Products Corporation. On May 3, 1917, P. R. Huffstetler filed their claims pursuant to the order entered by the court on said 13th of January, 1917, respondent is not advised as to date of completion of the contract referred to, but is advised that said contract was completed May 5, 1917. Petitioner appeared and moved as set out in paragraph seven of the petition.

(10) The claims of Frank B. Ingold, Stewart & Romaine Manufacturing Company, Binswanger & Company, General Fire Extinguisher Company, The McClamrock Company, Norfolk Iron Wire Works, and Piepkorn Henning Electric Company were filed and motions made as set out in paragraphs eight and nine of the petition.

(11) All of said motions by petitioner were overruled and exception taken and petitioner given time to demur, plead or answer the original complaint and interventions.

(12) Each of the claims filed pursuant to the order and notice of January 13, 1917, is a distinct claim on behalf of each claimant and against the W. J. Brent Construction Company and its surety, and claims the benefit of the action instituted by the United States at instance of B. F. Kline pursuant to the statute.

(13) Respondent says therefore that the proceedings as herein set out are within the jurisdiction of the District Court of the United States for Western District of North Carolina and in accordance with the United States statutes in such cases made and provided.

All of which matters respondent prays may be inquired of by the court.

Petitioner has heretofore filed his motion to reject the petition filed herein, to which motion is attached his brief of authorities which petitioner prays may be considered along with this answer.

JAMES E. BOYD,
U. S. District Judge Western District,
United States of America.

By R. RANDOLPH HICKS,
His Attorney.